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No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JANUS INDUSTRIES, DOING BUSINESS AS ACAPULCO SMOKE SHOP, AND JAMES B. JANUS,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress can extend its Commerce Clause to prohibit intrastate sale of drug paraphernalia, without providing a statutory nexus to interstate commerce or finding that the proscribed activity affected commerce.

2. Whether the Grand Jury's indictment of the defendants failed to state an essential element of the alleged crime, i.e. the nexus with interstate commerce.

3. Whether the search and seizure of evidence in this case violated the Fourth Amendment of the Constitution because of the lack of particularity inherent in the statutory definition of drug paraphernalia.

LIST OF PARTIES

The parties to the proceeding are:

Petitioners:

JANUS INDUSTRIES, doing business as
Acapulco Smoke Shop, and JAMES B. JANUS.

Respondent:

UNITED STATES.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Paties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	3
I. Drug Paraphernalia Act Lacks Requisite Interstate Nexus	4
II. The Indictment was Fatally Defective for Failing to State the Elements of the Alleged Crime as Charged	9
A. Jury instructions do not cure defective indictment	11
III. The Search Was Unconstitutionally Overbroad	
A. Insufficient Identification of Items to be Seized and Qualification of Affiant	14
B. Generic descriptions do not Satisfy Particularity	16
Conclusion	19

TABLE OF CITATIONS

Cases Cited:

Celiac v. Maryland, 17 U.S. (1 Wheat.) 316, 405 (1819) 4

Hammer v. Dagenhart, 247 U.S. 251 (1918) 8

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S 264, 311 (1981) 4,5

Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092-1099, 89 L.Ed2d 271 (1986) 14

Marcus v. Search Warrant, 367 U.S. 717, 81 S.Ct. 506, 13 L.Ed.2d 1127 (1961) 16

Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927) 14,16

New York v. United States, 112 S.Ct. 2108, 2131 (1992) 9

Posters 'N' Things, Ltd., _____ U.S._____,114 S.Ct. 2271 (1994) 5

Russell v. United States, 369 749, 763-66, 82 S.Ct. 1038, 1047-48, 8 L.Ed.2d 240 (1962) 10,11

Sanford v. Texas, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965) 16

Scarborough v. United States, 431 U.S. 563 (1977) 8

Stirone v. United States, 361 U.S. 212, 216-18, 80 S.Ct. 270, 274, 4 L.Ed. 2d 240 (1962) 6,10,11,12,13

United States v. Bass, 404 U.S. 336, 344, 92 S.Ct. 515,521 (1971) 7,8

United States v. Broncheau, 597 f.2d 1260, 1262 n.1 (9th Cir.), cert denied, 444 U.S. 59, 100 S.Ct. 123, 62 L.Ed.2d 80 (1979) 12

United States v. Brown, 995 F.2d 1493, 1504-1505 (10th Cir. 1993), certiorari denied 114 S.Ct. 353, 126 L.Ed.2d 317 12

United States v. Calandra, 414 U.S. 338, 343,94 S.Ct.613, 617, 38 L.Ed.2d 561 (1974) 10

United States v. Cardwell, 680 F.2d 75, 77 (9th Cir. 1982) 18

United States v. Carll, 105 U.S. 611, 612, 26 L.Ed 1135 (1881) 10

United States v. Cina, 699 F.2d 853, 859 (7th Cir. 1983), cert. denied, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983) 12,13

United States v. Crockett, 812 F.2d 626, 629 & n. 3 (10th Cir. 1987)..... 12

United States v. Cruikshank, 92 U.S. 542, 558, 23 L.Ed. 588 (1875) 10

United States v. Daily, 921 F.2d 994, 1004 & n. 11 (10th Cir. 1990)..... 11

United States v. Fuccillo, 808 F.2d 173, 176-177 (1st Cir.)(stolen goods), cert. denied 482 U.S. 905, 107 S.Ct. 2481, 96 L.Ed.2d 374 (1987)..... 18

United States v. Garrett, 984 F.2d 1402, 1415 (5th Cir. 1993)..... 11

United States v. Holaman, 871 F.2d 1496, 1509 (9th Cir. 1988)..... 18

United States v. Hooker, 841 F.2d 1225, 1227-32 (4th Cir. 1988) 10,11,12

United States v. Leary, 846 F.2d 592, 600 (10th Cir. 1988)..... 17

United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)..... 17

United States v. Lopez, 1995 WL 238421 (U.S.) 6

United States v. Maxwell, 920 F.2d 1028, 1033 (D.C. Cir. 1990) 18

United States v. Mize, 756 F.2d 353, 355-56 (5th Cir. 1985)..... 11

United States v. Moore, 185 F.2d 92, 94 (5th Cir. 1950)..... 10,13

United State v. Peterman, 841 F.2d 1474, 1477, (10th Cir. 1988), cert. denied, 488 U.S. 1004, 109 S.Ct. 783, 102 L.Ed. 2d 774 (1989)..... 11

United States v. Place, 462 U.S. 696, 701, 103 S.Ct. 2637, 2641, 77 L.Ed 2d 110 (1983)..... 14

United States v. Radetsky, 535 F.2d 556, 562 (10th Cir.), cert denied, 429 U.S. 820, 97 S.Ct. 68, 50 L.Ed.2d 81 (1976) 11

United States v. Smith, 553 F.2d 1239, 1242 (10th Cir. 1977) 12

United v. Williams, _____ U.S. _____, 112 S. Ct. 1735, 118 L.Ed. 2d 352 (1992) 13

Virginia Bankshares, Inc. v. Sandberg, 500 U.S. ___, ____, n. 8, 115 L.Ed. 2d 929, (1991)..... 13

Voss v. Bergsgaard, 774 F.2d 402, 405 (10th Cir. 1985)..... 18

Statutes Cited:

21 U.S.C. section 863. .....5 , 6, 7 ,10, 13, 16

21 U.S.C. section 857 ..... 5, 6, 7, 13, 16

Other Authority Cited:

2 W.LaFave & J. Israel, Criminal Procedure s 19.2, at 452 (1984) 10

APPENDIX

Appendix A - February 27, 1995 Tenth Circuit Order Denying Rehearing 1a

Appendix B - January 18, 1995 Tenth Circuit Order and Judgment 4a

Appendix C - March 9, 1994 United States District Court Judgment in a Criminal Case for Janus Industries 25a

Appendix D - March 9, 1994 United States District Court Judgment in a Criminal Case for James B. Janus 29a

Appendix E - Indictment dated July 20, 1993 ..... 35a

COMES NOW the Petitioners James B. Janus and Janus Industries, doing business as Acapulco Smoke Shop, and respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. B, infra) was issued on January 18, 1995 is unreported. The judgment of the district court (App. B, infra) is unreported.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1). The Court of Appeals for the Tenth Circuit entered its judgment on January 18, 1995, (App. B, infra). On February 27, 1995, the Tenth Circuit, without comment, denied the petition for rehearing and suggestion of rehearing en banc (App. A, infra). A copy of that order is attached.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause of the Constitution, Article I, Section 8, Clause 3 provides "The Congress shall have Power...to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

2. The Fourth Amendment provides "... no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

3. The provisions of 21 U.S.C. sections 857 and 863, 21 U.S.C. section 1956(a)(1)(A)(i) are set out in Appendix A.

STATEMENT OF THE CASE

This case raises the issue of the unconstitutional assertion of jurisdiction over intra state actions alleged to have violated 21 U.S.C. sections 857 and 863. It further raises the question of an elver search warrant.

The prosecution of the Defendant was a result of Operation Pipe, an investigation by the U.S. Customs Service into suspected drug paraphernalia dealerships throughout the United States.

On January 29, 1991, Agent Jeff Santelli (an employee of the United States Air Force Office of Special Investigations) went to the Acapulco Smoke Shop, at 3520 Brighton Boulevard in Denver, as a potential customer, to see whether or not there was any drug paraphernalia on the premises. Mr. Santelli claimed he saw "drug paraphernalia" there, and this bold assertion became the basis for a search warrant. The agents arrived to "secure" the premises about 5:30 or 6:00 p.m., but Agent Kline did not arrive with the search warrant until about 9:00 or 9:15. Other than a reference to the definition of drug paraphernalia contained in the statute, there was no description in the search warrant of what items were to be seized.

Without any way to distinguish between alleged contraband and lawful products, a great many lawful items were also seized. These included tobacco pipes, "safe can," 10,000 plastic bags, and many boxes of glass of his stock.

A civil forfeiture action, Case Number 91 B 2055 in the United States District Court, District of Colorado was commenced by the Government in November, 1991. That case sought to declare the warehouse at 3520 Brighton Boulevard a

nuisance, and sought to forfeit Mr. Janus' warehouse, bank accounts and residence in Lakewood, Colorado to the Government. After nearly two years of ongoing civil litigation, the Government sought dismissal of that forfeiture proceeding in order to proceed the criminal action against the Petitioners. The defendant objected, and contended that the "civil" case was so punitive as to constitute a double jeopardy bar to the second "criminal" case. However, over the defendant's objection, the "civil" case was retired from the active docket by the trial court on September 3, 1993.

James B. Janus and James B. Janus Industries, Petitioners, were indicted by a federal grand jury on July 20, 1993. The indictment, attached as Appendix D, infra, alleged that the defendants sold drug paraphernalia. The defense sought suppression of evidence on the basis that the search warrants and affidavits were invalid, and that the resulting discovery of the seven small marijuana plants was tainted because it was discovered pursuant to an invalid search warrant and general exploratory search.

In a memorandum on jury instructions during the trial, defense counsel pointed out that the indictment referred to conduct which occurred under three different versions of the federal drug paraphernalia statute. Because Count 1 of the indictment alleged conduct "from on or about August 1, 1988 through November 29, 1990," the applicable statutes were both 21 U.S.C. 857 and 21 U.S.C. 863. Due to the complications that this would cause in drafting a proper jury instruction, the Court dismissed Count 1, and the case went to the jury on Counts 2 and 3 (drug paraphernalia counts) and Count 161 (cultivation of marijuana).

REASONS FOR GRANTING THE PETITION

The Drug Paraphernalia Act (the Act), originally 21 U.S.C. section 857, 21 U.S.C. section 863 as re-enacted on or

about January, 1990, purports to extend federal law to reach intrastate conduct. This intrudes into criminal law, an area traditionally regulated by the states. This law is not a proper exercise of its federal authority since Congress failed to make the findings necessary to properly exercise its commerce power. An interstate commerce nexus must still be required as an essential element of the crime of sale of drug paraphernalia under 21 U.S.C. section 863. The federal government is not empowered with plenary police power. Congress must find that an activity affects commerce before regulating it as a necessary prerequisite to its assertion of authority under the commerce clause. Petitioner's conviction must be overturned because the government failed to prove that the conduct of Petitioner had any connection to or substantially affected interstate commerce. Moreover, the conviction must be reversed because the grand jury indictment was fatally flawed by its failure to properly identify which version of the statute Petitioner was to be tried under, and it failed to allege the crucial element of interstate commerce. Finally, Petitioner's conviction must be reversed because the search and the resulting evidence was obtained pursuant to an elver search warrant and unconstitutional general search.

I. Drug Paraphernalia Act Lacks Requisite Interstate Nexus

Petitioner was convicted under 21 U.S.C. section 863 which makes it unlawful to sell or offer to sell drug paraphernalia. Congress "can exercise only the powers granted to it" by the Constitution. Celiac v. Maryland, 17 U.S. (1 Wheat.) 316, 405 (1819). "[U]nlike the reserved police powers of the States, which are plenary unless challenged as violating some specific provision of the Constitution, the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce

Clause." Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S 264, 311 (1981). To properly invoke its commerce power, Congress must either regulate interstate commerce directly or find that the activity to be regulated substantially affects interstate commerce.

In the earlier version of the drug paraphernalia statute, there was a jurisdictional interstate commerce nexus, which is explicitly stated in 21 U.S.C. section 857. In section 863 of the law as re-enacted in 1990, however, no jurisdictional interstate commerce nexus was stated. Moreover, in enacting this Legislation, Congress did not make any findings that the sale of drug paraphernalia is a class of activities "affecting commerce", or which had a cumulative effect on interstate commerce. This is a crucial defect. For example, in Title II of the Consumer Credit Protection Act, 18 U.S.C. ss 891 et seq., Congress made explicit findings that extortionate credit transactions affect interstate commerce. Section 201(a) of Title II May 29, 1968, states in pertinent part: "Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce" 18 U.S.C. s 891.

Petitioner submits that, with reference to the federal drug paraphernalia statute, Congress failed to make the necessary findings which demonstrate a substantial effect on interstate commerce. Specifically, Congress in re-enacting the Act failed to link the activity proscribed by the Act to commerce, either by including an express commerce nexus or making the necessary supporting findings concerning the impact of intrastate sale of goods on the nation's commerce. As noted by this Court in the Posters 'N' Things, Ltd., _____ U.S._____,114 S.Ct. 2271 (1994), the only Congressional history that exists for any of the law's three versions is the House subcommittee hearing which is memorialized in Hearing on H.R. 1625 before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives, 99th Congress, second session, May 8, 1986. That Congressional report does not contain any findings with

regard to the impact of the activities on commerce, nor does it allude to any other hearings. The attenuated relation, if any, to interstate commerce, and broad sweep of the statute, is a constitutionally impermissible attempt to establish a federal police power and Petitioner Janus' conviction under it cannot stand.

The federal government may act only pursuant to a power granted to it by the United States Constitution. Among those powers granted is the power to regulate interstate commerce. Broad as the commerce power is, its scope is not unlimited, particularly where intrastate actions are concerned. The power to regulate commerce may be plenary, but the reach of that power is circumscribed by the Constitution and is not a comprehensive grant of federal power. It does not convert the Constitution from a system of government with enumerated federal powers into one in which the only subject matter limitations placed on Congress are those which it chooses to impose upon itself. There was, and still is, a definitional difference between a federal government and a national government.

That portion of 21 U.S.C. section 863 under which Petitioner was convicted is invalid because Congress has failed to link the regulated activity to interstate commerce, either by including an express commerce nexus or making the necessary supporting findings. For example, the Act is silent about the effect of the sale of a zip loc plastic bag (which defendant was criminally charged with selling) on interstate commerce. Also the Act fails to indicate the extent to which Congress desired to exercise its Commerce Clause power. The Supreme Court has never held such findings to be implicit in the enactment of legislation; rather it has consistently looked to legislative history or legislative debate to establish Congressional rationale. Stirone v. United States, 361 U.S. 212, 216-18, 80 S.Ct. 270, 274, 4 L.Ed. 2d 240 (1962).

The recent opinion of this Court int United States v. Lopez, 1995 WL 238421 (U.S.), decided April 26, 1995, would appear to reinforce the requirement that Congress must still articulate and require an interstate nexus. This Court stated "[t]he Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation." Id at 238121, *10. Here, Congress has failed to legislate within the scope of its authority. The Judicial branch does not have the authority under the Constitution to construct an Interstate Commerce bridge where none exists. And when legislation intrudes upon traditional state prerogatives, explicit findings are essential to demonstrate the legislation's validity. In the few cases in which the Supreme Court has excused the absence of Congressional findings, there have always been ample indicia of a commerce nexus upon which to rely, by means of statutory definitions, legislative history or previous regulation of the activity in question. The government in this case is attempting to "boot strap" the lawfulness of the drug paraphernalia statute, apparently by invoking a general "police power" that the federal government does not have.

The Tenth Circuit's decision of January 18, 1995 implicitly accepted this argument in its finding that courts have consistently upheld congressional regulation of the class of intrastate drug activities. The Court went on to find that "[t]herefore, because intrastate sales of drug paraphernalia are part of this properly regulated class, it follows that the drug paraphernalia statute is a proper exercise of Congressional power."

It is not implicit in the legislation that the federal drug paraphernalia statute is part of the larger regulated class of drugs. This is a determination that Congress must make, not the courts. As this Court stated in United States v. Bass, 404 U.S. 336, 344, 92 S.Ct. 515,521 (1971) a court's interpretation does "not substitutes for congressional lawmaking." The Bass Court

set aside the conviction for possession of a firearm because the government had failed "to show the requisite nexus with interstate commerce." Id 404 U.S. at 347, 92 S.Ct. at 522. In Scarborough v. United States, 431 U.S. 563 (1977), the Court characterized Congress's deliberate use of the term "affecting commerce" in the statute at issue as a "means to insure [its] constitutionality." Id at 575 & n.11. The decision of Congress to delete this language in 21 U.S.C. section 863 when it had been present in 21 U.S.C. section 857 reinforces what must be apparent: that the statute lacks an adequate nexus to interstate commerce. Congress's omission of any interstate commerce element from 863 cannot be considered a mere oversight. And even if it were, then this Court would still have to judicially dismiss Petitioner's conviction, just as in Bass, for the government did not prove an essential element of the crime.

The relationship between the commerce clause and the police power was tested during the emotionally charged Progressive Era in the case of Hammer v. Dagenhart, 247 U.S. 251 (1918). In Hammer, federal legislation forbade the shipment in interstate commerce of any goods manufactured in any plant that used prohibited child labor. This Court held the child labor statute in Hammer to be invalid because Congress had used its admitted powers over interstate commerce to eliminate a state's "internal affairs" completely. The issue of child labor laws had long been an emotional one, and there was a powerful consensus in the Progressive movement that these statutes were absolutely necessary to counteract the evils of an unrestrained laissez-faire economic system which tolerated, and indeed encouraged child labor. The Court was in the awkward position of having to defend jurisdictional limitations that worked against what it thought to be highly desirable social regulation.

Likewise, Petitioner in this case is well aware of the justified concern in this country about effects of drugs in the nation. The fact that the war on drugs is in the nation's best interests does not mean that the Commerce Clause has unlimited

scope. On the contrary, a clear and confined scope of the role of the executive branch is particularly appropriate to restrain the ever-increasing number of federal criminal statutes. As this Court recently held:

> [T]he Constitution protects us from our own best intentions. It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

New York v. United States, 112 S.Ct. 2108, 2131 (1992).

The increased federalization of traditional statelawcrimes by the Congress has a far-reaching impact on ourconceptual ideal of the balance between state and federal power. At a minimum, if Congress intended to depart fromits historical and traditional "substantial effect" requirement, then it should have clearly spelled out the basis for it reach of power to a local business.

II. The Indictment was Fatally Defective for Failing to State the Elements of the Alleged Crime as Charged

Petitioner was indicted under both the old version, section 857 of Title 21 and under the re-enacted version, section 863 of Title 21. The District Court refused Petitioner's request to clarify with specificity exactly under which law he was being prosecuted. The trial judge allowed the indictment to stand, but failed to clarify for the jury exactly which law was being applied and what evidence was "relevant to an essential element of the crime charged,". Had the trial judge required the government to

crime charged,". Had the trial judge required the government to identify with clarity and accurately the version of the law that was at issue, the elements would necessarily have been identified. The absence of any proof of that essential element of interstate commerce for the counts under which Petitioner was convicted by the government renders the grand jury's decision to indict fatally deficient.

It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge. See United States v. Calandra, 414 U.S. 338, 343,94 S.Ct.613, 617, 38 L.Ed.2d 561 (1974). An indictment that merely tracks the language of the relevant statute is valid only if the statute "fully, directly, and expressly, without any uncertainty or ambiguity, sets forth ali the elements necessary to constitute the offense...." Russell v. United States, 369 U.S. 749, 765, 82 S.Ct. 1038, 1047, 8 L.Ed.2d 240 (1962) (quoting United States v. Carll, 105 U.S. 611, 612, 26 L.Ed 1135 (1881)). Where the statutory definition of an offense employs generic terms, it is not sufficient to charge the offense in the same terms employed by the statute; the indictment must "descend to particulars." Russell, 369 U.S. at 765, 82 S.Ct. at 1047 (quoting United States v. Cruikshank, 92 U.S. 542, 558, 23 L.Ed. 588 (1875)).

An indictment that fails to allege a commerce nexus, where such a nexus is a necessary element of the offense, is defective. See Stirone v. United States, 361 U.S. 212, 216-18, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960) (Hobbs Act); United States v. Hooker, 841 F.2d 1225, 1227-32 (4th Cir. 1988) (en banc) (RICO); United States v. Moore, 185 F.2d 92, 94 (5th Cir. 1950) (FLSA). This is true even though the language of section 922(q) contains no such requirement. See Russell v. United States, 369 749, 763-66, 82 S.Ct. 1038, 1047-48, 8 L.Ed.2d 240 (1962); 2 W.LaFave & J. Israel, Criminal Procedure s 19.2, at 452 (1984). Finally, because an indictment cannot be amended,

the failure to allege each element is fatal. Cf. United States v. Garrett, 984 F.2d 1402, 1415 (5th Cir. 1993); United States v. Mize, 756 F.2d 353, 355-56 (5ht Cir. 1985).

A. Jury instructions do not cure defective indictment

The Tenth Circuit has held that the fundamental problem of the defect in the indictment is not solved by the jury instruction because "[j]ury instructions may not include an element of an offense if that element was not charged in the indictment. (citations omitted). United State v. Peterman, 841 F.2d 1474, 1477, (10th Cir. 1988), cert. denied, 488 U.S. 1004, 109 S.Ct. 783, 102 L.Ed. 2d 774 (1989). This was a charge to the petit jury, while the mandate of "inclusion of all elements ... derives from the Fifth Amendment, which requires that the grand jury have considered and found all elements to be present," United States v. Hooker, 841 F.2d 1225, 1230 (4th Cir. 1988) (en banc) (emphasis added); see Stirone v. United States, 361 U.S. 212, 217, 80 S.Ct. 270, 273, 4 L.Ed. 2d 252 (1960) (holding variance "destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury").

> Further, "and of paramount importance, a sufficient indictment is required to implement the Fifth Amendment guaranty and make clear the charges so as to limit a defendant's jeopardy to offenses charged by a group of his fellow citizens, and to avoid his conviction on facts not found, or perhaps not even presented to, the grand jury that indicted him." United States v. Radetsky, 535 F.2d 556, 562 (10th Cir.), cert denied, 429 U.S. 820, 97 S.Ct. 68, 50 L.Ed.2d 81 (1976), overruled in part on other grounds by United States v. Daily, 921 F.2d 994, 1004 & n. 11 (10th Cir. 1990); see Russell v. United States, 369 U.S. 749, 770, 82 S.Ct. 1038, 1050, 8 L.Ed.2d 240 (1962).

Here the failure of the indictment to allege all the essential elements of an offense under s 856(a)(2) is a jurisdictional defect requiring dismissal, despite citation of the underlying statue in the indictment. See United States v. Crockett, 812 F.2d 626, 629 & n. 3 (10th Cir. 1987); United States v. Broncheau, 597 f.2d 1260, 1262 n.1 (9th Cir.), cert denied, 444 U.S. 859, 100 S.Ct. 123, 62 L.Ed.2d 80 (1979). "[T]he absence of prejudice to the defendant does not cure what is necessarily a substantive, jurisdictional defect in the indictment." United States v. Smith, 553 F.2d 1239, 1242 (10th Cir. 1977). In a recent case the Tenth Circuit took judicial notice of a critical omission of an essential element from the indictment -- sua sponte -- handed down by the grand jury and vacated a conviction. United States v. Brown, 995 F.2d 1493, 1504-1505 (10th Cir. 1993), certiorari denied 114 S.Ct. 353, 126 L.Ed.2d 317. The Brown court went on to state that: ." United States v. Smith, 553 F.2d 1239, 1242 (10th Cir. 1977).

"[j]ury instructions may not include an element of an offense if that element was not charged in the indictment." United States v. Peterman, 841 F.2d 1474, 1477 (10th Cir. 1988), cert. denied, 488 U.S. 1004, 109 S.Ct. 783, 102 L.Ed.2d 774 (1989). This was a charge to the petit jury, while the mandate of 'inclusion of all elements...derives from the Fifth Amendment, which requires that the grand jury have considered and found all elements to be present,' United States v. Hooker, 841 F.2d 1225, 1230 (4th Cir. 1988) (en banc)(emphasis added); see Stirone v. United States, 361 U.S. 212, 217, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960)(holding variance "destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury").

An essential element of a crime - one that affects a substantial right - is "one whose specification ... is necessary to establish the very illegality of the behavior and thus the court's jurisdiction." United States v. Cina, 699 F.2d 853, 859 (7th Cir.

1983), cert. denied, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983). Although the missing element here does not describe overt illegal behavior, it is nonetheless essential in a federal indictment because it establishes the court's jurisdiction. See Stirone, 361 U.S. at 218, 80 S.Ct. at 273 (Hobbs Act indictment must charge effect on interstate commerce in order to show federal government's jurisdiction of crime); United States v. Moore, 185 F.2d 92, 94 (5th Cir. 1950) (indictment for violation of Fair Labor Standards Act does not state an offense if it does not show defendants were engaged in interstate commerce or otherwise within coverage of Act).

Established Supreme Court practice indicates that an issue is proper for certiorari if it was either presented or passed upon by the court below. United v. Williams, _____ U.S. _____, 112 S. Ct. 1735, 118 L.Ed. 2d 352 (1992). Certiorari may be permitted for "... review of an issue not pressed so long as it has been passed upon..."

Additionally, this Court has held the following:

> Respondents argue that this issue was not raised below. The appeals court, however, addressed the availability of a right of action to minority shareholder in respondents' circumstances and concluded that respondents were entitled to sue. It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law. Virginia Bankshares, Inc. v. Sandberg, 500 U.S. ___, ____, n. 8, 115 L.Ed. 2d 929, (1991) (citations omitted; internal quotation marks omitted).

III. THE SEARCH WAS UNCONSTITUTIONALLY OVERBROAD

A. Insufficient Identification of Items to be Seized and Qualification of Affiant

The definition of drug paraphernalia in the federal drug paraphernalia statute is so broad that a search warrant which refers only to the statutory language must necessarily be so elver as to violate the Fourth Amendment. The principle is clearly stated in Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927), that "[t]he requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is be taken, nothing is left to the discretion of the officer executing the warrant." Id at 196, 48 S.Ct. at 76. The generic "catch-all" descriptions of alleged contraband used in the affidavit submitted to the Magistrate to obtain a search warrant does not satisfy the particularity requirement of the Fourth Amendment. A seizure of personal property is "per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." (emphasis added) United States v. Place, 462 U.S. 696, 701, 103 S.Ct. 2637, 2641, 77 L.Ed 2d 110 (1983) (footnote omitted) (citing Marron v. United States, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed 231 (1927)). A reviewing court must examine the underlying factual assertions of an affiant where the "... the request is outside the range of the professional competence expected of an officer. If the magistrate issues the warrant in such a case, his action is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty." Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092-1099, 89 L.Ed2d 271 (1986). The determination of what constitutes drug paraphernalia clearly was

"outside the scope of the professional competence" of Customs Agent Traci Kline, who submitted the search warrant affidavit. Kline made no claim of expertise and, indeed, admitted her lack of drug paraphernalia knowledge at the trial (T p.77, lines 8-18). She admitted that she did not know what a "hashish head," a "chillum" or an "air-driven pipe" are, even though these items are specifically identified as drug paraphernalia in the statute (T p. 77, l. 1-7). She had never written any articles on what drug paraphernalia is, never attended any lectures on the subject, and did not consider herself an expert in what drug paraphernalia is (T p. 63, l. 24) through p. 64, l. 2). Significantly, she admitted she had no training in the use of tobacco products (T p. 63, l. 24) through p. 64, l. 2) even though these items are specifically excluded from the reach of the drug paraphernalia statute.

The Court of Appeals found that Kline had been a "special agent for the U.S. Customs" for four years and lead agent for Operation Pipe. It did not find that she had any training during those four years in the identification of drug paraphernalia. The Magistrate did not have the requisite facts upon which to issue a search warrant. The one and only reference in the affidavit is the claim of agent Kline that Special Agent Santelli saw items he called drug paraphernalia. Those items were never described or identified. The affidavit in support of the January 21, 1991 search warrant fails to establish probable cause because it lacks any indicia of expertise or reliability of the information provided by the "special agent" from the "Office of Special Investigation of the Department of Defense". The affidavit does not contain any mention of his training or experience in recognizing "drug paraphernalia". The federal drug paraphernalia statute sets forth exemptions which virtually make it impossible for the investigating officer and reviewing magistrate to determine if the items at issue are legal or illegal. The agents in charge of the investigation, likewise lacked the expertise to identify "drug paraphernalia".

Further, the agent who drafted the affidavit for the search warrants omitted any reference to the statutory criteria found in subparagraph (e) of the federal drug paraphernalia statue, or any other "logically relevant" factors to distinguish between lawful and unlawful items. It is undisputed that a great many items which were seized were found not to be drug paraphernalia. This undisputed fact highlights the intrinsic danger in failing to adhere to the constitutionally mandated need to have a magistrate independently review an affidavit for the requisite showing of probable cause.

B. Generic descriptions do not Satisfy Particularity

The question presented for review is the issue of whether the Fourth Amendment prohibition against a lack of particularity may be modified permitting " [a] warrant describing items to be seized in broad and generic terms may be valid if the description is as specific as circumstances and nature of the activity under investigation permit.'" (citation omitted) Appendix A, p. 10.

The decisions of this Court, although not directly in point, provide basic guidelines as to when a generic description is sufficient. When the issue has been raised, it has often been in the context of the First Amendment. See Sanford v. Texas, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965) and Marcus v. Search Warrant, 367 U.S. 717, 81 S.Ct. 506, 13 L.Ed.2d 1127 (1961). In Marcus the Court struck down a search warrant authorizing seizure of "obscene materials." The Court struck down that warrant even though the materials to be seized were described in statutory terms. Although the Court's decision in that case concerned encroachment of First Amendment rights, the basic premise of the Marron case was reiterated in condemning a warrant in which there exists " no guide to the exercise of informed discretion..." of the executing officer. 367 U.S. at 732, 81 S.Ct. at 1716. Fundamental to the Court's

concern was what the court perceived as the impossibility of executing the warrant "with any realistic expectation that the obscene might be accurately separated from the constitutionally protected." Id

The warrants at issue in this case fail because they vested unlawful discretion to executing officers. The warrant failed to distinguish or provide the executing agents with criteria for distinguishing any contraband which might be found from the rest of an individual's possessions. Furthermore, there is no indication that the people executing the warrant had any expertise in identifying illegal drug paraphernalia nor that they had any particular knowledge of the statutory criteria.

This selective justice erodes the Constitutional mandate that a warrant particularly describe the things to be seized in order to avoid the prohibitions against general search. The approach in the Tenth Circuit's January 18, 1995 decision seem to be "because it is difficult to define drug paraphernalia, the search warrant does not have to specify what the agents are authorized to search for." In effect, the end is justifying the means. Here the broad definition of the alleged crime under investigation is permitted to broaden, and thereby avoid, the particularity requirement of the Fourth Amendment. This was not the intent of the Framers of the Constitution, nor the Supreme Court in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

To allow a general statutory description of prohibited items to substitute for a particular description of items to be seized in the warrant is merely a legal artifice (expedient) to justify elver searches.

In United States v. Leary, 846 F.2d 592, 600 (10th Cir. 1988) the Tenth Circuit found that the warrant essentially contained no limitation at all on the property to be seized and thus required the suppression of evidence seized thereby. The court in Leary found that the officers had failed to notify the reviewing magistrate that the company had a legitimate business.

Here the existence of a legitimate tobacco business requires greater specificity of items sought to be seized. However, in this case the warrant referenced the statute with no regard to the Defendant's legitimate tobacco business, despite the specific stated exceptions for tobacco products.

The Fourth Amendment requires that a warrant particularly describe both the place to be searched and the person or things to be seized. The description must be specific enough to enable the person conducting the search reasonably to identify the things authorized to be seized.

Whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not. Mere reference to the statute provides no readily ascertainable guidelines for the executing officers as to what items to seize. See United States v. Maxwell, 920 F.2d 1028, 1033 (D.C. Cir. 1990) (wire fraud); United States v. Holaman, 871 F.2d 1496, 1509 (9th Cir. 1988) (fraud); United States v. Fuccillo, 808 F.2d 173, 176-177 (1st Cir.)(stolen goods), cert. denied 482 U.S. 905, 107 S.Ct. 2481, 96 L.Ed.2d 374 (1987); Voss v. Bergsgaard, 774 F.2d 402, 405 (10th Cir. 1985) (conspiracy); United States v. Cardwell, 680 F.2d 75, 77 (9th Cir. 1982) (tax evasion). Absent some limitation curtailing the officers' discretion when executing the warrant, the safeguards of having a magistrate determine the scope of the search is lost. As a consequence, authorization to search without limitation is so broad as to constitute a general warrant.

Without the requisite guidance to the executing officers as to which items were to be seized, there exists in substantial and unjustifiable likelihood of a violation of personal rights. The probability of violation is enhanced by the complex nature of the search in this case and the fact that the premise being searched was a retail outlet for various items as the source of Defendant's economic livelihood. The effect of the execution of the search warrant in this case was to put the Defendant out of business as a practical matter.

CONCLUSION

The Statute does not contain the requisite nexus to interstate commerce. The count of the indictment under which Petitioner was convicted likewise failed to establish the interstate commerce element. The search warrant failed to describe the items sought with sufficient particularity. For all of these reasons, the judgment of the court of appeals should be reversed, and the conviction of the Petitioner be reversed.

Respectfully submitted,

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